Supreme Court, U.S.
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No. 14-981

In the

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CENTER FOR EQUAL OPPORTUNITY, AMERICAN CIVIL RIGHTS INSTITUTE, PROJECT 21, AND THE NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), Center for Equal Opportunity (CEO), American Civil Rights Institute (ACRI), Project 21, and the National Association of Scholars (NAS) respectfully submit this brief amicus curiae in support of Petitioner Abigail Fisher.[1]

PLF is a non-profit, tax-exempt corporation organized under the laws of the State of California, for the purpose of engaging in litigation in matters affecting the public interest. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF has extensive litigation experience in the area of racial discrimination, racial preferences, and civil rights. PLF has participated as amicus curiae in nearly every major United States Supreme Court case involving racial classifications in the past three decades, from *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), to *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary*, 134 S. Ct. 1623 (2014).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

CEO is a non-profit research, education, and public advocacy organization. CEO devotes significant time and resources to studying racial, ethnic, and gender discrimination by the federal government, the states, and private entities, and educating Americans about the prevalence of such discrimination. CEO publicly advocates for the cessation of racial, ethnic, and gender discrimination by the federal government, the states, and private entities. CEO has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Schuette*, 134 S. Ct. 1623; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Ricci v. DeStefano*, 557 U.S. 557 (2009); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

ACRI is a non-profit research and educational organization. ACRI monitors and researches laws that ban government's use of race, sex, or ethnicity in public contracting, public education, or public employment. ACRI devotes significant time and resources to the study of racial, ethnic, and gender discrimination by the federal government, the states, and private entities. ACRI has participated as amicus curiae in numerous cases relevant to the analysis of this case. *See Fisher*, 133 S. Ct. 2411; *Ricci*, 557 U.S. 557; *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter*, 539 U.S. 306.

Project 21 is an initiative of The National Center for Public Policy Research designed to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility has not traditionally been echoed by the nation's civil rights establishment. Project 21 participants seek to make America a better place for African-Americans, and all Americans, to live

and work. Project 21 has participated as amicus curiae in numerous relevant cases, including *Schuette*, 134 S. Ct. 1623; *Fisher*, 133 S. Ct. 2411; *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

NAS is an independent membership association of academics working to foster intellectual freedom and to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. NAS supports intellectual integrity in the curriculum, in the classroom, and across the campus. NAS is dedicated to the principle of individual merit and opposes race, sex, and other group preferences. As a group comprised of professors, graduate students, administrators, and trustees, NAS is intimately familiar with the issues relevant to the analysis of this case. NAS, CEO, ACRI, PLF, and Project 21 all participated in this case when it was previously before this Court. *See Fisher*, 133 S. Ct. 2411.

This case raises important issues of constitutional law. Amici consider this case to be of special significance in that it concerns the fundamental issue of whether public institutions may resort to racial discrimination to attain the benefits that flow from a diverse student body when non-racially discriminatory means are available, workable, and successful. Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to the Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

The University of Texas at Austin (University) discriminated against Abigail Fisher when it considered her race as a criterion for admission to the University. *Fisher*, 133 S. Ct. at 2415. The current question presented to this Court is whether the University's racial discrimination was justified because it used the least discriminatory means of achieving the educational benefits that flow from a diverse student body. *Cf. Grutter*, 539 U.S. at 343.

Race-based admissions policies are matters of intense public concern that raise significant constitutional questions that should be settled by this Court. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) (A state's "[p]referment by race . . . can be the most divisive of all policies."). This Court previously sought to provide clear guidelines and standards for lower courts to apply when ruling on the constitutionality of race-based admissions, but stopped short of applying those principles to the University's race-based policy. *See Fisher*, 133 S. Ct. at 2419-22. This resulted in considerable confusion in the courts below regarding how to apply this Court's decision. *See Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 661 (5th Cir. 2014) (Garza, J., dissenting). Review is required on this important federal question to clarify how lower courts are to apply strict scrutiny—and this Court's *Fisher* decision—to race-based university admissions.

The *Fisher* Court held that the University's decision to use race to attain the educational benefits of diversity is "entitled to no deference," *Fisher*, 133 S. Ct. at 2420, and that a reviewing court must verify

that the University's use of race was required in order to achieve its goal. Here, however, the lower court accepted the University's assertion that it used race to attain a "critical mass" of racially diverse students without requiring the University to define "critical mass" or explain how attaining a critical mass helped further its educational interest. *See Fisher*, 758 F.3d at 649; *id.* at 666-74 (Garza, J., dissenting). If "critical mass" is wholly subjective, then lower courts cannot determine whether any given race-conscious policy is "not a quota," "sufficiently flexible," and "limited in time." *Fisher*, 133 S. Ct. at 2421. Moreover, without clearly defining "critical mass," lower courts are unable to scrutinize whether race-neutral alternatives would provide the same benefits at a lower cost to individuals subject to a university's discriminatory admissions practices. *Id.*

The proper application of strict scrutiny to racially discriminatory university admissions policies is an issue of national importance. Instead of treating this Court's decisions as a warning to scale back reliance on race, public universities are using *Grutter* and *Fisher* as justification for employing racial criteria in their admission practices. Amicus CEO has produced empirical studies examining the admission practices at many institutions of higher education. Each study reached the same conclusion—public universities are using racial criteria to favor preferred minority applicants and to turn away applicants representing disfavored races.

This Court's decision in *Fisher* explained that public universities must seriously consider whether the educational benefits of race-conscious admissions can be achieved in a less discriminatory and costly manner.

That decision has fallen on deaf ears. Responses received from public records requests submitted to public universities after *Fisher* reveal that they are not seriously considering workable race-neutral alternatives to racially selective admissions policies. Moreover, the responses indicate that public institutions are not considering the costs attendant to racial preferences, and whether those costs outweigh the purported benefits. *See Fisher*, 133 S. Ct. at 2420 (universities need to consider the costs of race-conscious measures).

So long as it remains constitutional for a university to pursue diversity through race-conscious means, race-based admissions will remain. Review is needed to ensure that whenever a university engages in pernicious racial discrimination, its action is necessary and limited to attaining the educational benefits of a diverse student body.

ARGUMENT

I

THIS COURT SHOULD GRANT THE PETITION FOR CERTIORARI BECAUSE PROPER APPLICATION OF STRICT SCRUTINY IS REQUIRED TO PROVIDE LOWER COURTS WITH A CLEAR EXAMPLE OF APPLYING STRICT SCRUTINY TO RACE-BASED ADMISSIONS POLICIES

State action which distinguishes individuals on the basis of race is, in most circumstances, "irrelevant and therefore prohibited." *Grutter*, 539 U.S. at 326 (citations omitted). Accordingly, all race-based measures are subject to strict scrutiny, which requires

the government to prove that its discriminatory means are "narrowly tailored" to further a "compelling" state interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). A court reviewing a university's race-based admissions policy may defer to the university's determination that its interest in diversity is "compelling," but a university is entitled to no deference on its determination that race-based means are necessary, or proper.[2] *Fisher*, 133 S. Ct. at 2420. Here, the University is not entitled to deference on the question of whether it has enrolled a "critical mass" of under-represented minorities, because the answer determines whether race-based measures are necessary.

The University's need to prove that its race-based policy is necessary to attain a critical mass is at the heart of this case. Yet, throughout this lawsuit, the University has never articulated what constitutes a "critical mass" of under-represented minority students, whether race-conscious admissions help it achieve a critical mass, or when it will know that a critical mass has been attained. At different stages of the litigation, the University argued that its race-conscious policy was needed to achieve a critical mass of students to ensure "classroom" diversity, *see Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 244 (5th Cir. 2011), to achieve "diversity within diversity," *see Fisher*, 758 F.3d at 650-52, to eliminate "racial isolation," *see id.* at 642, or accomplish other purposes. *See generally id.* at 640-

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[2] This may be a difficult distinction to maintain. *See* Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2012-2013 Cato Sup. Ct. Rev. 63, 77. The Court has repeatedly held that deference is "fundamentally at odds" with strict scrutiny and equal protection jurisprudence. *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005).

60 (explaining various understandings of "critical mass" and its purpose in the University's admissions policy). Neither the University nor the court below was able settle on a precise meaning of "critical mass." *Fisher*, 758 F.3d at 666 (Garza, J., dissenting) ("[T]he majority repeatedly invokes the term 'critical mass' without even questioning its definition.").

The University's inability to explain how its race-based admissions policies are necessary to achieve a "critical mass" of under-represented minority students renders the policies unconstitutional. This Court has consistently required that, before government resorts to racial preferences, it must identify the object of those preferences *with precision*. *See Shaw v. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989). Specificity is required because the means chosen to accomplish the goal must "work the least harm possible," *Bakke*, 438 U.S. at 308 (op. of Powell, J.), and be narrowly tailored to fit the interest "with greater precision than any alternative means." *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting) (citation omitted); *see also Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015) ("The least-restrictive-means standard is exceptionally demanding.").

If a university has already admitted a critical mass of under-represented students, race-conscious admissions criteria are not necessary because the school has already attained the educational benefits of a diverse student body. *See Grutter*, 539 U.S. at 329. Race-conscious measures may be employed, if at all, only up to the point when the university has enrolled a critical mass. *See Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 639-40 (1987) (even if the

government could consider race in order to attain a balanced workforce, it could not do so to maintain one). A university that continues to use race-conscious measures after enrolling a critical mass of minority students can only serve the purpose of increasing minority representation outright—a goal this Court has repeatedly held to be unconstitutional. *See Bakke*, 438 U.S. at 307; *Croson*, 488 U.S. at 507 Consequently, when "critical mass" is subject to multiple interpretations, courts cannot judge whether a university's means are necessary to achieve its goal.

A related problem with allowing the state to use the vague and undefined goal of "critical mass" occurs when a court is required to evaluate whether a university has given serious consideration to workable race-neutral alternatives. Without a clear understanding of the goal of a university's discriminatory admissions policy, lower courts are simply unable to scrutinize whether the chosen means serve to further that goal in the least harmful way possible. *Croson*, 488 U.S. at 510. Whether a university has enrolled a critical mass necessarily determines when, and the extent to which, a university may undertake efforts to attain a racially diverse student body. But the lack of critical mass does not automatically grant universities the authority to adopt race-conscious measures to achieve the educational benefits of diversity. If less harmful—*i.e.*, less discriminatory—means are readily available to achieve the University's goal, then resorting to race-conscious means is *per se* unconstitutional. *See Fisher*, 133 S. Ct. at 2420.

Thus, without clearly defining critical mass, lower courts face two significant problems. First, it is

impossible to determine if a university has a justification to undertake *any* efforts to attain a racially diverse student body. Second, lower courts cannot determine if race-neutral measures would suffice to attain a critical mass of under-represented minority students. Evaluating the availability of various means to achieve diversity requires courts to weigh the costs and benefits of race-conscious means against the costs and benefits of race-neutral means. *See Fisher*, 133 S. Ct. at 2420. Without having a clearly defined goal, lower courts cannot make those judgments.

Courts must be able to weigh the benefits of the means chosen with the costs attendant to racial preferences. "If the need for the racial classifications . . . is unclear, . . . the costs are undeniable." *Parents Involved*, 551 U.S. at 745 (plurality op.). So long as the "undeniable" costs outweigh the benefits, the University simply cannot have chosen the least restrictive means of attaining a "critical mass" of under-represented minority students. Here, the costs of the University's policy are significant. Racial classifications of any sort pose the risk of lasting harm to our society." *Shaw v. Reno*, 509 U.S. 630, 657 (1993). "The equal protection principle," that was "purchased at the price of immeasurable human suffering," reflects "our Nation's understanding that such classifications ultimately have a destructive impact on the individual and society." *Adarand*, 515 U.S. at 240 (Thomas, J., concurring). Discrimination based on race is "illegal, immoral, unconstitutional, inherently wrong, and destructive of a democratic society." *Croson*, 488 U.S. at 521.

Race-conscious admissions policies create a significant risk that a university is stereotyping individuals in unconstitutional ways. Preferences given broadly to certain racial groups in the admissions process require stereotyping those individuals as embodiments of a particular race. "Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (citation omitted). This is contrary to the intent of the Fourteenth Amendment, which is to ensure that all persons will be treated as individuals, not "as simply components of a racial . . . class." *Miller*, 515 U.S. at 911 (internal quotation marks omitted, citation omitted).

Even if a racially diverse campus is beneficial to academic institutions, using racially preferential admissions policies to achieve that end imposes real harms on the students who are admitted through racial preferences. Several studies reveal that racial preferences in college admissions result in an "academic mismatch" that leads to lower grades and higher drop-out rates among minority students. *See, e.g.*, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) (describing academic mismatch at law schools); Rogers Elliott, et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. in Higher Educ. 681 (1996) (mismatch at elite colleges and universities). No matter where academic mismatch occurs, lower grades lead to lower levels of academic self-confidence, which in turn increases the likelihood that minority students

will lose interest in continuing their education and drop out. Generations of minority students who would have succeeded without race-based admission policies are saddled with far greater risks of failure because of academic mismatching. *See* Linda Datcher Loury & David Garman, *College Selectivity and Earnings*, 13 J. Lab. Econ. 289, 301, 303 (1995); Audrey Light & Wayne Strayer, *Determinants of College Completion: School Quality or Student Ability?*, 35 J. Hum. Resources 299, 301 (2000).

These—and other costs[3]—are the "undeniable" result of racial classifications in university admissions. *See Parents Involved*, 551 U.S. at 745 (plurality op.). And they will inevitably continue if universities are not required to clearly articulate why race-conscious policies are necessary to achieve a "critical mass" of under-represented minority students at their campuses. When race-neutral measures can achieve the same "critical mass," the costs of engaging in race-conscious policies cannot outweigh the benefits. *See Fisher*, 133 S. Ct. at 2420. This Court should grant certiorari to ensure that, whenever a public university employs racial preferences, the preferences are narrowly tailored to attain this Court's approved state interest relating to the educational benefits of a diverse student body.

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[3] For a more exhaustive list *see* Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 435-36 (2005), and Roger Clegg, *Online Fisher Symposium: No Compelling Interest, No Reason Not to Say So*, Scotusblog (Sept. 6, 2012, 12:24 PM), http://www.scotusblog.com/2012/09/online-fisher-symposium-no-compelling-interest-no-reason-not-to-say-so/.

II

RACIAL PREFERENCES IN UNIVERSITY ADMISSIONS ARE PREVALENT ACROSS THE COUNTRY

Advocates of race-based diversity recognize that universities' primary means of securing racially diverse campuses is through racially selective admissions processes. *See* William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 26-27 (1998) ("[A]lmost all academically selective institutions [share] a commitment to enrolling a diverse student population—and, as one way of achieving this objective, to paying attention to race in the admissions process."). This Court's *Grutter* decision allowed public institutions to reintroduce and expand racial preferences in the name of "diversity." *Fisher* clarified that race must be an option of last resort, but did not demonstrate how the Court's decision applied to a specific race-conscious policy. Without such guidance, public universities will not change their discriminatory behavior.

Amicus CEO has studied the admission practices of dozens of institutions of higher education both before and after this Court's decision in *Grutter*. CEO's studies assess the degree of racial and ethnic admission preferences in admissions by using a statistical model that predicts the probability of admission at a given university for members of different ethnic and racial groups, holding their other qualifications constant. CEO's studies present admissions data in terms of the relative odds of members of Group A being admitted as compared with members of Group B, while controlling for other

important variables like test scores, grades, and residency status. The same conclusion can be drawn from each study—public universities are using racial criteria to favor preferred minorities and to turn away applicants for admission of disfavored races.

The following chart shows the undergraduate admissions practices at the University of Wisconsin-Madison for the 2006 and 2007 applicant pools.[4] Black and Hispanic applicants were preferred at ratios of between 500 and 1500 to 1 over both Asian and white applicants.

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[4] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Undergraduate Admissions at the University of Wisconsin-Madison*, Center for Equal Opportunity, at 16, *available at* http://www.ceousa.org/attachments/article/5[illegible]/U.Wisc.undergrad.pdf (last visited Mar. 11, 2015).

University of Wisconsin-Madison
(2007 and 2008 applicant pools)

Univ. of WI-Madison (2007 and 2008)	Odds Ratio[5] (with SAT)	Odds Ratio (with ACT)
Black over White	576 to 1	1330 to 1
Hispanic over White	504 to 1	1494 to 1
Asian over white	1 to 1	1 to 1

Other reports confirm that it is increasingly the case that Asians are discriminated against in addition to, and sometimes even more than, whites. *See* Russell K. Nieli, *How Diversity Punishes Asians, Poor Whites and Lots of Others*, Minding The Campus, July 12, 2010;[6] Yunlei Yang, *Asian Americans Would Lose Out Under Affirmative Action*, L.A. Times, Oct. 1,

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[5] The odds ratio here, and in all subsequent tables, is arrived at after controlling for both academic (LSAT/SAT, GPA, class rank) and non-academic factors (year of admission, gender, residency, etc.). The odds ratio measures the magnitude of the preference given relative to the baseline group (in these studies, whites). As the study explained, an odds ratio equal to or greater than 3.0 to 1 is commonly accepted to reflect a strong association; an odds ratio less than 3.0 to 1, but greater than 1.5 to 1, reflects a moderate association; an odds ratio of 1.5 or less to 1 indicates a weak association. For example, a very strong association might be taken to be the rough equivalent of the relative odds of smokers versus non-smokers dying from lung cancer, which in one well-known study is calculated as 14 to 1. Nagai, *supra*, *University of Wisconsin-Madison*, at 14-15.

[6] *Available at* http://www.mindingthecampus.com/2010/07/how_diversity_punishes_asians/ (last visited Mar. 11, 2015).

2014.[7] CEO demonstrated similar preferences in the undergraduate admissions at two public universities in Ohio.

Ohio State University and Miami University[8]

Miami University (2006 and 2007 applicant pools)	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	8.0 to 1	10.2 to 1
Hispanic over White	2.2 to 1	2.2 to 1
Asian over white	2.1 to 1	1.6 to 1
OH State University (2005 and 2006 applicant pools)	Odds Ratio (with SAT)	Odds Ratio (with ACT)
Black over White	3.3 to 1	7.9 to 1
Hispanic over White	4.3 to 1	6.5 to 1
Asian over white	1.5 to 1	2.1 to 1

CEO has also studied the degree of racial preference at public law schools. For example, at the University of Utah College of Law, Black and Hispanic

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[7] *Available at* http://www.latimes.com/opinion/opinion-la/la-ol-affirmative-action-sca5-asian-americans-20141001-story.html (last visited Mar. 11, 2015).

[8] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Undergraduate Admissions at Two Ohio Public Universities*, Center for Equal Opportunity, at 13, *available at* http://www.ceousa.org/attachments/article/547/OHIO3.7.pdf (last visited Mar. 11, 2015).

applicants were strongly preferred over white applicants.

University of Utah College of Law
(2010 admissions cycle)[9]

Univ. of Utah - Law	Odds Ratio
Black over White	163 to 1
Hispanic over White	7 to 1
Asian over white	4 to 1

The University of Utah College of Law is not alone. CEO studies measuring the degree of preferences at law schools at the University of Wisconsin, University of Nebraska, Arizona State University, and University of Arizona revealed similar preferences for black and Hispanic applicants.

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[9] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission to the University of Utah College of Law*, Center for Equal Opportunity, at 1-2, *available at* http://www.ceousa.org/attachments/article/880/Utah Law School.pdf (last visited Mar. 12, 2015).

University of Wisconsin Law School
(2005 and 2006 applicant pools)[10]

Univ. of WI - Law	Odds Ratio
Black over White	61.4 to 1
Hispanic over White	14.2 to 1

University of Nebraska College of Law
(2006 and 2007 applicant pools)[11]

Univ. of NE - Law	Odds Ratio
Black over White	442 to 1
Hispanic over White	90 to 1
Asian over white	6 to 1

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[10] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Wisconsin Law School*, Center for Equal Opportunity, at 12-13, *available at* http://www.ceousa.org/attachments/article/545/U.Wisc.law.pdf (last visited Mar. 11, 2015).

[11] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Nebraska College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/attachments/article/544/NE_LAW.pdf (last visited Mar. 11, 2015).

Arizona State University College of Law
(2006 and 2007 applicant pools)[12]

ASU - Law	Odds Ratio
Black over White	1,115 to 1
Hispanic over White	85 to 1
Asian over white	2 to 1

University of Arizona College of Law
(2006 and 2007 applicant pools)[13]

Univ. of Ariz. - Law	Odds Ratio
Black over White	250 to 1
Hispanic over White	18 to 1
Asian over white	3 to 1

These odds ratios indicate the extent of racial and ethnic preferences at the different schools. Because the statistical analysis holds all factors constant except for race, the ratios demonstrate the strength of preferences given to preferred minority students over white students. The schools grant very strong preferences to blacks, and generally to Hispanics as

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[12] Althea K. Nagai, Ph.D., *Racial and Ethnic Admission Preferences at Arizona State University College of Law*. Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/attachments/article/541/ASU_LAW.pdf (last visited Mar. 11, 2015).

[13] Althea K. Nagai, Ph.D., *Racial and Ethnic Preferences in Admission at the University of Arizona College of Law*, Center for Equal Opportunity, at 15, *available at* http://www.ceousa.org/attachments/article/577/AZ_Law.pdf (last visited Mar. 11, 2015).

well. In other words, black and Hispanic applicants are preferred minorities and have much greater odds of acceptance than do Asian applicants, who are not preferred minorities and fare no better than similarly situated white applicants. There can only be one conclusion: racial admission preferences are pervasive among institutions of higher education.

III

PUBLIC UNIVERSITIES REACTED TO *FISHER* WITH BUSINESS AS USUAL

As demonstrated above, universities responded to this Court s decision in *Grutter* by granting racial preferences to black and Hispanic applicants under the label of improving "diversity." In *Fisher*, this Court cautioned public universities not to automatically increase the use of racial preferences, and explained that racial preferences are only countenanced where they are "necessary" to achieve the educational benefits of diversity. *Fisher*, 133 S. Ct. at 2420. Further, universities bear the burden of proving that "workable race-neutral alternatives" cannot achieve the educational benefits of a diverse student body. *Id.*

Despite this Court's warning against a race-first approach, *Fisher* sparked little to no discussion about the necessity of racial preferences at public universities. Amici requested data from numerous public universities through public records requests. The responses to those requests reveal that public institutions have not considered race-neutral alternatives to attaining the educational benefits of a diverse student body. Nor have they weighed the costs and benefits of engaging in racial discrimination. In

other words, *Fisher* has gone largely ignored at the nation's flagship public universities.

After *Fisher*, Amicus CEO requested records from 22 public universities across the country. The requests sought all documents that "mention" a number of contemporary articles and studies discussing the costs of racial preferences at public universities.[14] Eleven of the universities responded that they have no documents responsive to the request, and of the remaining universities only two—the University of North Carolina and the University of Colorado-Boulder—provided any documents responsive to the request.[15]

Amicus NAS—through its various state-based affiliates—sent public records requests to the University of Connecticut and the University of Virginia after the *Fisher* decision.[16] Those requests asked for any documents showing that the universities had considered race-neutral alternatives before

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[14] True and correct copies of the 22 records requests are available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/CEO-FOIA-letters.pdf (last visited Mar. 11, 2015).

[15] The eleven universities that responded with no responsive documents were University of Connecticut, Clemson University, Georgia Tech University, University of Florida, University of Iowa, University of Maryland, Purdue University, Texas A&M University, Virginia Tech University, and University of Wisconsin-Madison. True and correct copies of these responses are available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/FOIA-responses.pdf (last visited Mar. 11, 2015).

[16] True and correct copies of the records requests to the University of Connecticut and the University of Virginia are available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/UVa-and-UConn-requests.pdf (last visited Mar. 11, 2015).

employing racial preferences, and any documents showing the reasons those alternatives were rejected. NAS also asked for any documents that discussed the relative costs and benefits of racially preferential admissions policies. The University of Connecticut responded with a link to its admissions page and a paper copy of the amicus brief it signed onto in *Fisher*.[17] The University of Virginia responded with its admissions "Reader Sheet" and a letter from the Office for Civil Rights stating the University of Virginia's consideration of race "is consistent with strict scrutiny."[18] Neither university responded with documents showing that it has seriously considered race-neutral alternatives, nor did the universities indicate they weighed the costs and benefits of racial preferences.

These responses—and lack of responses—strongly suggest that universities have not taken this Court's *Fisher* decision seriously. Amici have uncovered no evidence that universities have weighed the "undeniable" costs of racial preferences against the benefits their policies are designed to achieve. Furthermore, Amici have uncovered no evidence that

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[17] A true and correct copy of the University of Connecticut's response is *available at* http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/UConn-Response-of-January-21.pdf (last visited Mar. 11, 2015). A copy of the brief the University of Connecticut signed onto in *Fisher* is available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-345_respondentamcuappalachianunivetal.authcheckdam.pdf (last visited Mar. 11, 2015).

[18] A true and correct copy of the University of Virginia's response is available at http://blog.pacificlegal.org/wp/wp-content/uploads/2015/03/UVA-response-letter.pdf (last visited Mar. 11, 2015).

public institutions have given serious consideration to workable race-neutral alternatives.

Contrary to *Fisher*, public universities continue to grant racial preferences without seriously examining whether they are needed, and without any urgency to move towards race-neutral alternatives. Without a strong statement from this Court, racially selective admissions policies will become even more common and entrenched.

CONCLUSION

Neither *Grutter* nor *Fisher* sanctioned the unquestioning use of race by our nation's public universities. This Court should accept review of this case to make it clear that the use of race in admissions must be supported by clear, coherent goals, adopted after all other means of achieving racial diversity have been tried and shown to be unsuccessful. At a time when the changing demographic of America make ethnic-sorting increasingly untenable, review by this Court is needed to explain the limits on a public university's discriminatory behavior.

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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